Supreme Court, U.S.
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OFFICE OF THE CLERK

No. ____

In The Supreme Court of the United States

PENG LI,

Petitioner,

v.

US DEPARTMENT OF JUSTICE,
Executive Office for Immigration Review,
Board of Immigration Appeals,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Arthur Ladds
Counsel of Record
ATTORNEY AT LAW
521 Fifth Avenue
New York, New York 10175
(212) 292-4444

Lawrence S. Kerben
ATTORNEY AT LAW
125-26 Queens Boulevard
Kew Gardens, New York 11415
(718) 575-8282

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED

Whether the petitioner's denial of an asylum request involves both questions of law and fact?

Whether the petitioner's denial of an asylum request violated her Constitutional Rights?

STATEMENT PURSUANT TO RULE 29.6

Petitioner does not own any share in any publicly held company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 4

ARGUMENT 5

I. The Court erred in denying petitioner's petition for review. The BIA's denial of petitioner's asylum request involves questions of law and fact 5

II. The Court erred in denying petitioner's petition for review. The BIA's denial of petitioner's asylum request involves Constitutional Violations 6

CONCLUSION.....7

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Aguilera v. Kirkpatrick,
241 F.3d 1286 (10th Cir. 2001).....6

Balogun v. U.S. Attorney General,
-F.3d-, WLO 2333840 (11th Cir. 2005).....7

Luis v. I.N.S.,
196 F.3d 36 (1st Cir. 1999).....7

Constitutional Provisions

U.S. CONST. amend. V.....2, 5, 6, 7

U.S. CONST. art. III.....2, 5, 6, 7

U.S. CONST. art. VI.....2, 5, 6, 7

Statutes

8 U.S.C. § 1158(a)(2)(B).....2, 5, 6

8 U.S.C. § 1158(a)(2)(D).....2, 5, 6, 7

8 U.S.C. § 1252(a)(2)(D).....2, 4

8 U.S.C. § 1252(a)(9).....2, 4, 5

8 U.S.C. § 1252(a)(f)(2).....*passim*

28 U.S.C. § 1254(1).....1

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Immigration Judge's opinion denying petitioner's claim for asylum, withholding of removal to China and protection under the Convention Against Torture. (App. 9) The Board of Immigration Appeal's decision summarily affirming the Immigration Judge's decision without opinion. (App. 4) United States Court of Appeals for the Second Circuit's opinion denying the Petition for Review. (App. 1) The United States Court of Appeal for the Second Circuit denied the following Petition for Rehearing and suggestion for *En Banc* hearing. (App. 20)

STATEMENT OF JURISDICTION

The Court of Appeals entered its amended opinion and order on November 9th, 2006, after denying Petition for Rehearing *En Banc*. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The provision of the Immigration and Nationality Act 8 U.S.C. Section 1158(a)(2)(B), 8 U.S.C. Section 1158(a)(2)(D), 8 U.S.C. Section 1252(a)(2)(D), 8 U.S.C. Section 1252(a)(9), 8 U.S.C. Section 1252(a)(f)(2), 5th Amendment of the United States Constitution, Article III of the United Stated Constitution granting asylum relief, Article VI of the United States Constitution involving treaty rights, and Article 33 of the U.N. Protocol.

STATEMENT OF THE CASE

Respondent is a native of the People's Republic of China. In accordance with China's family planning policy, she was forced to sign a document stating that she and her husband would not have any more children after the birth of her daughter. She was allowed to use any type of contraceptive to make sure she did not get pregnant again. Between 1984 and 1985, respondent was forced to have 3 abortions for violating this one child family planning policy. The first abortion occurred in early 1984 after she had learned that she was four months pregnant. Upon learning of her pregnancy, the family planning officer at her workplace immediately had her taken to a hospital where she was forced to endure the pain and agony of a midterm abortion. After this occurrence, Chinese officials allowed her to use oral contraceptives in order to prevent future pregnancy. In her workplace she was humiliated and ridiculed for getting pregnant again. A freedom that we see as fundamental and private in our society brought her

condemnation in her workplace. Adding insult to injury, her conceiving a child was the cause of a reduction in her bonus and pay.

In the following year and a half, respondent was forced to have two more abortions with the third leading the officials to insert an IUD in her body that would prevent her from conceiving any more children. At work she was humiliated even further. She was forced to make speeches in front of her coworkers where she condemned her own actions and she was used as an example in employee booklets. Furthermore, although she was assigned more responsibility in her job, she was no longer given any bonus for her work efforts.

In 1998, after finally saving enough money to leave China, respondent obtained an L2 visa from the United States Embassy in order to come to the United Sates. She knowingly used false documents to obtain the visa and paid approximately $12.000. USD – Since then, she has worked at a Nail Salon and has struggled to make it in this country. She has taken on a therapist to finally help her deal with the deep psychological trauma and depression that has prevented her from living a normal life for many years.

On June 23, 2003, Immigration Judge Sandy K. Hom issued a ruling finding petitioner removable to China – denying petitioner's claim for asylum and withholding of removal as relied on under the Convention Against Torture Act. (App. 9) On July 17, 2003, petitioner filed a timely notice of appeal to the BIA. On September 9, 2004, the BIA issued an

order granting the withholding of removal, but dismissing the appeal for asylum. (App. 4) On October 7, 2004, petitioner filed a timely petition for review on the BIA's decision regarding asylum with the United Stated Court of Appeals for the Second Circuit. On August 9, 2006, the Second Circuit denied petitioner's appeal for asylum. (App. 1) On November 8, 2006, the Second Circuit denied petitioner's Petition for Rehearing *En Banc*. (App. 20)

This Petition for a Writ of Certiorari followed.

REASON FOR GRANTING THE WRIT

In accordance with 8 U.S.C. Section 1252(a)(2)(D), the United States Appeals Court for the Second Circuit retains jurisdiction to review constitutional claims and "questions of law". The proceedings in this case involved both a question of fact and a question of law. The Court denied the petitioner's petition for review because the Court felt that the issue of extraordinary circumstance in filing an untimely application for asylum was a "question of fact" – and not within the scope of its jurisdiction.

8 U.S.C. Section 1252(a)(9) allows the Court judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States. Further, 8 U.S.C. Section 1252(a)(f)(2) states that "not withstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under

this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law."

By ignoring the valid extraordinary circumstances presented by petitioner excusing the timeliness of an asylum application under 8 U.S.C. Section 1158(a)(2)(D), the BIA ignored the clear and convincing evidence presented by petitioner, which is prohibited by law under aforementioned 8 U.S.C. 1252(a)(f)(2). Furthermore, by ignoring clear and convincing evidence of a valid extraordinary circumstance, the BIA violated petitioner's due process rights under the 5th Amendment, Article III granting asylum relief, and Article VI treaty rights of the U.S. Constitution.

ARGUMENT

I. The Court erred in denying petitioner's petition for review. The BIA's denial of petitioner's asylum request involves questions of law and fact

Upon judicial review, 8 U.S.C. Section 1252(a)(9) allows the Court to consolidate questions of law and fact. In the present case, when the BIA denied the petitioner's valid claim of an extraordinary circumstance for the filing of an asylum application under 8 U.S.C. Section 1158(a)(2)(B), a question of law arose concerning the BIA's ruling. 8 U.S.C. Section 1252(a)(f)(2) allows the Court judicial review if there exists "clear and convincing" evidence that entry or execution of an order is prohibited by law. When the BIA denied

petitioner's right under Section 1158(a)(2)(B), it ignored petitioner's rights under aforementioned Section 1158. By doing so, the Court has the power to review the BIA's ruling under 8 U.S.C. Section 1252(a)(f)(2), because the BIA's ruling was prohibited by law, as exhibited by clear and convincing evidence. (See Joint Appendix and Petitioner's petition for review.)

II. The Court erred in denying petitioner's petition for review. The BIA's denial of petitioner's asylum request involves Constitutional Violations

Under Article III of the U.S. Constitution, individuals may be granted asylum relief. Article VI of the U.S. Constitution respects treaty rights, including Article 33 of the U.N. Protocol. Finally, the 5th Amendment of the U.S. Constitution grants individual equal protection and due process rights. When the BIA ignored the "clear and convincing" evidence presented, as allowed under 8 U.S.C. Section 1158(a)(2)(D), the BIA violated petitioner's Constitutional rights. The ruling of the BIA is prohibited by 8 U.S.C. Section 1252(a)(f)(2), whereby denying petitioner her due process rights accorded under the 5th Amendment. Further, the BIA's ruling was in violation of Article III and Article VI, which grants petitioner the right to asylum as dictated by governing law. The BIA's finding was erroneous, and petitioner should be afforded the asylum relief granted under Article III, as well as her treaty rights under Article VI. In *Aguilera v. Kirkpatrick,* 241 F.3d 1286, 1291 (10th Cir. 2001), the found that the Attorney General cannot act unconstitutionally.

(See also *Pena Luis*, 196 F.3d 36 (1st Cir. 1999) and *Balogun v. U.S. Attorney Genera*l, -F.3d-, WLO 2333840, at 2-5 (11th Cir. 2005)).

CONCLUSION

Petitioner respectfully requests that the Petition for the Writ of Certiorari be granted. The question before the court involves one of fact and law, and questions of constitutionality. The BIA's decision was not respectful of the "clear and convincing evidence" presented by petitioner regarding extraordinary circumstance and the timeliness of an asylum application under 8 U.S.C. Section 1158(a)(2)(D); disregarding petitioner's rights under Section 1158(a)(2)(D) is prohibited by law under Section 1252(a)(f)(2), and a violation of her Constitutional rights under Article III, Article VI, and the 5th Amendment. Henceforth, the Court has the power of judicial review in the present case, and the BIA's decision should be reversed and the request for asylum should be granted.

Respectfully Submitted,

Arthur Ladds
Counsel of Record
ATTORNEY AT LAW
521 Fifth Avenue
New York, NY 10175
(212) 292-4444

&

Lawrence Kerben
ATTORNEY AT LAW
125-26 Queens Boulevard
Kew Gardens, New York 11415
(718) 575-8282

Attorneys for Petitioner

TABLE OF CONTENTS
Appendix to Petition

Page

Summary Order of
The United States Court of Appeals
for the Second Circuit
entered August 9, 2006 ..... App. 1

Decision of
The Board of Immigration Appeals
entered September 9, 2004 ..... App. 4

Decision of
The Immigration Judge of the
United States Department of Justice
Executive Office for Immigration Review
entered June 23, 2003 ..... App. 9

Order of the
United States Court of Appeals
for the Second Circuit
Re: Denying Petition for Rehearing and
Petition for Rehearing *en banc*
entered November 8, 2006 ..... App. 20

U.S. Const. amend. V ..... App. 22

8 U.S.C. § 1158 ..... App. 23

8 U.S.C. § 1252 ..... App. 25

28 U.S.C. § 1254 ..... App. 35

[ENTERED: AUGUST 9, 2006]

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 9th day of August, two thousand and sex.

PRESENT:

HON. WILFRED FEINBERG
HON. JON O. NEWMAN
HON. CHESTER J. STRAUB,
Circuit Judges.

Peng Li,

Petitioner,

-v.-

US Department of Justice,
Executive Office for Immigration Review,
Board of Immigration Appeals,

Respondent.

FOR PETITIONER:	Lawrence S. Kerben, Kew Gardens, New York
FOR RESPONDENT:	Bud Cummings, United States Attorney for the Eastern District of Arkansas, Fletcher Jackson, Assistant United States Attorney, Little Rock, Arkansas.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that this petition for review of the Board of Immigration Appeals ("BIA") decision is DISMISSED.

Li Peng, through counsel, petitions for review of the BIA's September 2004 decision affirming Immigration Judge ("IJ") Sandy K. Horn's denial of her application for asylum. *In re Li Peng*, No. A 96

248 505 (BIA Sept. 9, 2004); No. A 96 248 505 (Immig. Ct. N.Y. City June 23, 2003). We assume the parties' familiarity with the underlying facts and procedural history.

Title 8, Section 1158(a)(3) of the United States Code provides that no court shall have jurisdiction to review the agency's finding that an asylum application was untimely under 8 U.S.C. § 1158(a)(2)(B), or its finding of neither changed nor extraordinary circumstances excusing the untimeliness under 8 U.S.C. 1158 (a)(2)(D). Norwithstanding that provision, however, this Court retains jurisdiction to review constitutional claims and "questions of law." 8 U.S.C. § 1252(a)(2)(D). Here, Li argues that her mental illness should have qualified as an extraordinary circumstance that excused her untimely-filed asylum application. This is not a "question of law" but rather a purely factual question that we do not have jurisdiction to review.

The petition for review is therefore DISMISSED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr

A TRUE COPY
Thomas W. Asreen, Acting Clerk
by /s/ _____
Deputy Clerk

[ENTERED: SEPTEMBER 9, 2004]

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A96248 505 -New York Date: SEP 09 2004

In re: PENG LI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Lawrence Steven Kerben, Esquire

CHARGE:

Notice: Sec. 237(a)(l)(A), I&N Act [8 U.S.C. § 1227(a)(l)(A)] - Inadmissable at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] -Immigrant - no valid immigration visa or entry document

APPLICATION: Asylum; withholding of removal; relief under the Convention Against Torture

On appeal, the respondent challenges the June 23, 2003, decision of the Immigration Judge

finding her removable as charged, and denying her application for asylum and withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231 (b)(3), respectively, as well as her application for relief under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.13, 1208.16-18. The respondent's request for oral argument is denied. The appeal will be sustained in part, and the respondent will be granted withholding of removal to China.

The respondent claims past persecution and a well-founded fear of future persecution in her native China on account of her opposition to that country's coercive population control policies. She indicated that she has 1 child. Reportedly, the authorities forcefully aborted her 3 subsequent pregnancies because she was not authorized to have more than 1 child.

The Immigration Judge denied the respondent's asylum application as untimely (I.J. at 3-4). He also found that the respondent failed to provide a satisfactory explanation why she failed to file her application in a timely fashion (I.J. at 3-4).

The record reflects that the respondent entered the United States on or about October 31,1998 (Exh. 1). She filed the asylum application, Form 1-589, on January 2,2003 (Exh. 2). Consequently, she failed to file a timely asylum application. *See* section 208(a)(2)(B) of the Act. At the same time, the respondent has failed to establish that she fells within one of the exceptions set forth in

section 208(a)(2)(D) of the Act (providing that an alien may apply for asylum notwithstanding the prohibition set forth in section 208(a)(2)(B) if she demonstrates either the existence of changed circumstances which materially affect her eligibility for asylum, or extraordinary circumstances relating to the delay in filing the application within the statutory period set forth in section 208(a)(2)(B) of the Act). See *also* 8 C.F.R. §§ 1208.4(a)(4) (changed circumstances), (5) (extraordinary circumstances).

The respondent indicated that she did not file for asylum in a timely fashion because she was traumatized by her 3 abortions (which occurred between the years 1984 and 1985) and was diagnosed with major depressive disorder. As such, she claims that her condition prevented her from filing for asylum in a timely fashion. We find that the respondent's explanation why she did not file her asylum application in a timely fashion does not meet the criteria governing consideration of untimely filed asylum applications based on "extraordinary circumstances." *See* 8 C.F.R. § 1208.4(a)(5)(0. The trauma which gave rise to the respondent's impairment occurred many years ago, and she appears to have functioned adequately over the years prior to seeking asylum in the United States in 2003. Moreover, the evidence reflects that the respondent received treatment and medication for her impairment since May 21, 2002, which is some 8 months before she filed her asylum application. As such, we agree with the Immigration Judge's conclusion that the respondent did not establish either changed conditions or extraordinary

circumstances. Accordingly, her asylum application was not filed in a timely fashion.

The Immigration Judge questioned the respondent's credibility, and he denied her withholding of removal claim on the basis that she failed to submit evidence which would prove her claim (I.J. at 4-5). He also observed that the respondent entered the United States with a fraudulently obtained visa (I.J. at 4-5).

We review this case pursuant to the standard set out in 8 C.F.R. § 1003.1(d)(3). The Immigration Judge's adverse credibility finding is clearly erroneous, as it is centrally based on speculation. The finding is also unsupported by specific discrepancies or inconsistencies which are central to the respondent's claim of having been forced to undergo 3 abortions. *See Diallo* v. *INS*, 232 F.3d 279 (2nd Cir. 2000). Likewise, the respondent's failure to submit evidence which would unambiguously prove her claim is not fatal. *See Qiu v. Ashcroft*, 329 F.3d 140 (2nd Cir. 2003). Moreover, although the respondent may have obtained through fraud documentation to leave her native China and to come to the United States, this appears to have been the only way for her to depart the country of persecution. *See Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998); *see also Matter of Pula,* 19 I&N Dec. 467 (BIA 1987).

Assuming the respondent's credibility in this case, we find that she has demonstrated past persecution in her native China on account of her opposition to that country's coercive population

control policies. Forced abortions of her 3 pregnancies amount to past persecution. *See Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997). Moreover, we find that the presumption of future harm in China has not been rebutted in this case. See 8 C.F.R. § 1208.16(b)(2); *INS* v. *Stevic*, 467 U.S. 407 (1984); *see also Matter of Y-T-L-*, 23 I&N Dec. 601 (BIA 2003). Therefore, we find that the respondent has established eligibility for withholding of removal. In view of the foregoing, the following orders shall be entered.

ORDER: The respondent's appeal from the June 23, 2003, decision of the Immigration Judge denying her asylum claim is dismissed.

FURTHER ORDER: The Immigration Judge's decision dated June 23, 2003, is vacated to the extent it denied the respondent's application for withholding of removal, and the respondent is granted withholding of removal to China.

/s/_____
FOR THE BOARD

[ENTERED: JUNE 23, 2003]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK

REMOVAL PROCEEDINGS

File No.: A96-248-505 Date: June 23,2003

In the Matter of

LI, Peng,

Respondent.

CHARGE:

Section 237(a)(l)(A) at the time of entry having been inadmissible pursuant to §212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA"), as amended.

APPLICATIONS:

Request for asylum in the United States pursuant to § 208 of the INA, as amended.

Request for withholding of removal pursuant to § 241(b)(3) of the INA, as amended.

In the alternative, request for withholding under Article 3, UN Convention Against Torture ("CAT"), 8 C.F.R. §208.16 *et seq.* (2002 ed.)

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Lawrence Kerben, Esq.	M. Amezquita, Esq.
125-26 Queens Blvd	Assist. Dist. Counsel
Kew Gardens, New York 11415	New York District, BICE

DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of People's Republic of China. The respondent, through counsel, admitted to the truth of the factual allegations contained in the Notice to Appear and conceded that the respondent was removable from the United States, as charged. ***See Exhibit I.*** Therefore, the court finds that the respondent is removable and that finding is supported by clear, unequivocal and convincing evidence. ***8 C.F.R. §240.8,*** (2002 ed), as amended. The respondent was given an opportunity to designate a country in the event removal would become necessary. The respondent declined, the Dept of Homeland Security, Bureau of Immigration and Custom Enforcement (*"BICE"*) directed People's Republic of China.

As relief from removal, the respondent has applied for asylum under § 208 of the INA, as amended by filing a Form 1-589, Request for Asylum in the United States. ***Exhibit 2.*** The asylum request is also considered a request for withholding of

removal pursuant to § 241(b)(3)of the INA, as amended. Respondent had also requested relief of withholding of removal under the Convention Against Torture (CAT). ***8 C.F.R. §208.16*** *et seq.* (2002 ed.) Respondent, via legal counsel, offered additional documents ***Exhibits 3-2 to 3-9*** and BICE submitted Dept. of State Country Reports for People's Republic of China for 2002, ***Exhibit 4***.

TESTIMONY

The respondent was the sole witness in the proceedings and she testified that she married on April 8, 1982, but has been estranged from her husband since 1997. The respondent stated that she is the mother of one child and that she left the People's Republic of China in 1998 and traveled to the United States when she obtain a L2 visa from the United States Embassy or Consulate. The respondent admitted that she knowingly used false documents to obtain the visa at the cost of 100,000 RMB equal to about $12,000+ USD. Respondent testified that after the birth of her first child she was required to sign an agreement to have only one child and that she was permitted to use oral contraceptive medication to prevent future pregnancy. But, respondent testified that she became pregnant and decided to have the child in violation to the family planning policy and in contravention to her written agreement. Respondent testified that after she went home to advise her family and spouse, the PRC officials dragged her to the hospital and verified her pregnancy. When confirmed, the officials performed a "mid-term" abortion without her consent or authorization. After a brief rest, the respondent

returned to work where she was confronted with recrimination and criticism by her co-workers at the factory. The respondent also stated she lost ½ months salary and received no bonus for violating the family planning policy.

Respondent testified that she became pregnant again and was forced to abort the pregnancy. The respondent stated she lost her bonus and again criticized for her violation of the policy by her co-workers. The respondent testified that she became pregnant again and attempted to hide from the authorities. The respondent stated that she was unsuccessful and that she was forced to abort her pregnancy. The last abortion took place in 1985.

Respondent stated that she has separated from her husband, but is still married to him. The respondent stated that when she came to the United States that she was "out-of-it" and not aware of the law. The respondent had also stated that she had no finances and had to support her daughter in China. Respondent testified that she has generally worked in a nail salon and has been engaged in that trade since 1999. The respondent testified she has not had any major illnesses since 1986 to the present and that she was never hospitalized at any time from 1986 to the present. Respondent, however, has submitted a medical report that confirm her depression and her propensity to cry and be emotional. The report is based upon sessions between the doctor and the respondent starting from May, 2002 to the present.

ASYLUM & WITHHOLDING OF REMOVAL

A respondent who is seeking a discretionary grant of asylum must demonstrate status as a refugee as defined by Section 101(a)(42) of the Immigration and Nationality Act. That definition includes the requirement that the respondent demonstrate an unwillingness or inability to return to his or her home country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. The requirement is met by a showing of circumstances under which a reasonable person would fear persecution.

Accordingly, in determining whether the respondent is eligible for asylum the respondent's subjective mental state must be considered against the background of circumstances prevailing in the respondent's home country. In some cases the only available evidence of the respondent's subjective fears may be the respondent's own testimony. Such solitary evidence can suffice where the testimony is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis of the respondent's fears. Finally, not just any fear of persecution will suffice to sustain the respondent's burden, the objective reasonability of persecution on account of a ground specified in Section 101(a)(42)(A) of the Act, and the respondent's subjectively reasonable fear of experiencing that persecution, both must be established.

In addition to establishing eligibility for a grant of asylum, a respondent has the burden of

establishing that a favorable exercise of discretion is warranted. The respondent also bears the evidentiary burden of proof and persuasion in applications for asylum and in withholding of removal.

A respondent who is seeking withholding of removal from any country must show that such respondent's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion. In order to make this showing, the respondent must establish a clear probability of persecution on account of one of the enumerated grounds. This clear probability standard requires a showing that it is more likely than not that the respondent would be subject to persecution.

ANALYSIS

One Year Limit

It is the opinion of the court that the respondent has not demonstrated that she is entitled to a grant of asylum. A major obstacle to respondent's request for asylum is the statutory and regulatory bar for such relief unless the respondent can demonstrate by *clear and convincing evidence* that she filed an application for asylum within one year from the date of her arrival. *See 8 C.F.R. §208.4(a)(2)(2002).* The one year calculation begins from the date of last arrival or 4/1/97 whichever is later. Therefore the outside date for asylum filing is 4/1/98 for those individuals that arrived before the 4/1/97 date. Respondent asserts that she arrived in

the United States on October 31, 1998. The respondent had filed her claim for asylum on January 2, 2003. As such, the respondent request for asylum can not be considered timely. However, respondent asserts that her untimely filing for asylum should be excused based upon the medical exception found in *8 C.F.R. §208.4(a)(5)(I)(2002).* It is the opinion of the court that respondent's explanation does not qualify as an exception. The provision requires serious illness and the testimony of the respondent does not demonstrate that her failure to file a timely application was due to serious illness. In fact, the respondent was ambulatory, employed and is educated having worked as a clerk, bookkeeper, then as an accountant for four years in the PRC. Moreover, the respondent has not suffered any serious illness from the period of 1986 to the present and was never hospitalized for any medical condition during the same period of time. The respondent's depression and therapy do not rise to the level of serious illness as required by the regulations. Further, the respondent had first visited her psychiatrist in May, 2002, long after the deadline for filing for asylum. Additionally, the filing exception in the regulations requires that the request for asylum, if untimely, be filed within a reasonable time period after the expiration of the filing date. In the case at bar, the respondent waited more than four (4) years to submit her asylum request. This is not a reasonable time period. Therefore the respondent is not eligible for asylum and is statutorily barred from such relief. See ***§208.4 INA***.

Merits

Nevertheless, the respondent is not barred from consideration with respect to withholding of removal or withholding under CAT, as noted in the regulations. However, in the event the Board of Immigration Appeals ("BIA") or a subsequent court determine that the respondent is entitled to consideration of asylum, this court will also render a determination on the merits for asylum, in addition to the withholding of removal under the INA and CAT.

It is the opinion of the court that the respondent has not demonstrated that she is entitled to a grant of asylum. The respondent failed to demonstrate sufficient proof of any past persecution or a well founded fear of persecution. While it is true that a respondent can demonstrate eligibility of asylum if she is consistent and credible in representation which evidences a coherent and plausible claim. However, when easily obtainable documentation are available to corroborate and verify her claim, then such documentation should be presented. ***Matter of S-M-J-***, 20 I&N Dec. 722 (BIA 1997). In assessing the substance of the respondent's presentation, the court found it to be lacking. Respondent's claim is uncorroborated by any medical evidence or medical records establishing that she had underwent coercive family planning treatment. The certificate presented by the respondent is of no evidentiary weight given the lack of information contained on the alleged "abstract." ***Diallo v. INS, 232 F3d 279 (2d Cir 2000)***. Moreover, respondent's testimony of why she was unable to obtain abortion

certificates for her two later procedures was confusing, contradictory and conflicting. The respondent stated that the facility did not have older records. However, when the BICE pointed out that the certificate provided by respondent related to her earliest first abortion, the respondent's further explanation was unresponsive and the reason offered certainly undermined her credibility. The respondent fails to provide, although easily obtainable as admitted by respondent, an affidavit from her spouse, family members or persons with personal knowledge regarding the coercive treatment that she allegedly received in the PRC. The respondent had also provided less than convincing testimony and explanation regarding why the PRC authorities would allow her *to* voluntarily chose the type of contraception in light of her constant violation of her written and oral assurances that she would not conceive again.

Also adverse to the respondent's claim of persecution is the fact that the respondent was continually promoted at her factory from clerk, bookkeeper to accountant despite her assertions that she was penalized by her co-workers and employer for violation of the family planning policy.

Respondent had submitted documents to corroborated her identity, alleged marriage, date and place of birth. The respondent had also provided a medical certificate regarding her abortion in 1984. However, this is insufficient, as noted above, as it lacks any corroboration. Also, given the respondent's admission that she was capable of obtaining facially valid, but fraudulent and false documents in order to

obtain her L visa from the United States Embassy or Consulate, the court was unable to give the Exhibits 3-2 to 3-9 any evidentiary weight to corroborate the respondent's claim of persecution. It is evident that the respondent engaged in forethought and planning to engage in a nefarious criminal act to defraud and hoodwink representatives of the United States in obtaining a visa to come to the United States. As such, it certainly would be incumbent upon the respondent to document her claim with corroborative evidence that is obtainable. Respondent has failed to do so. Further, respondent intentional criminal behavior is also adverse to her assertion that she was mentally or emotionally unable to file a timely request for asylum after her arrival to the United States.

It is the opinion of the court that respondent failed to demonstrate either past persecution or a well-founded fear of future persecution. As the respondent has failed to establish a well-founded fear of persecution, she has also failed to establish and meet the higher standard of proof necessary for withholding of removal under the INA. Clearly adverse to her claim that it would be more likely than not that she would suffer persecution within any of the enumerated grounds of § 101(a)(42)(a) of the INA at the hands of the PRC is the fact she is estranged from her husband and any claim of future family planning persecution would be speculative.

The respondent has also failed to demonstrate that she has met the burden of proof for withholding of removal under the Convention Against Torture. There was no evidence presented to the court to

indicate that the respondent would be tortured in the PRC.

Accordingly, the following orders will be entered:

ORDER

IT IS ORDERED THAT the respondent's request for asylum under §208 is time barred. But, should the Board of Immigration Appeals ("BIA") or a subsequent court determine that the respondent is entitled to consideration of asylum, this court would deny respondent's asylum request on the merits;

IT IS FURTHER ORDERED that the respondent's request for withholding of removal under §241(b)(3) is denied;

IT IS FURTHER ORDERED that the respondent's request for relief under CAT is denied;

IT IS FURTHER ORDERED that the respondent shall be removed from the United States to a People's Republic of China pursuant to the charge of removability contained in the Notice to Appear.

/s/_____
SANDY K. HOM
U.S. Immigration Judge

[ENTERED: NOVEMBER 8, 2006]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:	11/8/06
Docket:	04-5374-ag
Short Title:	Li v. Board of Immigration Appeal
Agency Number:	A96-248-505
Agency:	Immigration & Naturalization Service

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of November, two thousand six.

Peng Li, Docket No.: 04-5374-ag
Petitioner,

v.

US Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals,
Respondents.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Peng Li. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/_____
Motion Staff Attorney

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1158

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225 (b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

8 U.S.C. § 1252

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225 (b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225 (b)(1)

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225 (b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225 (b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225 (b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182 (h), 1182 (i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158 (a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182 (a)(2) or 1227 (a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227 (a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227 (a)(2)(A)(i) of this title.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a (c)(1)(B) of this title.

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the

immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158 (a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253 (a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for

violation of section 1253 (a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253 (a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231 (a) of this title;

(B) does not relieve the alien from complying with section 1231 (a)(4) of this title and section 1253 (g) [1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name

of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225 (b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225 (b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225 (b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225 (b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225 (b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225 (b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225 (b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

28 U.S.C. § 1254

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.